IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

SECOND APPEAL No. 242 of 2005

For Approval and Signature:

HONOURABLE MR.JUSTICE R.S.GARG

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1 Whether Reporters of Local Papers may be allowed to see the judgment ?

2 To be referred to the Reporter or not ?

3 Whether their Lordships wish to see the fair copy of the judgment ?

4 Whether this case involves a substantial question of law as to the interpretation of the constitution of India, 1950 or any order made thereunder ?

5 Whether it is to be circulated to the civil judge ?

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STATE OF GUJARAT & 2 - Appellant(s)
Versus
KAMLESHBHAI KHIMJIBHAI & 4 - Defendant(s)

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Appearance :
MR DIPEN DESAI, AGP for Appellants
MR AMAR D MITHANI for Respondents

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CORAM : HONOURABLE MR.JUSTICE R.S.GARG

Date : 18/09/2006

ORAL JUDGMENT

1. On 18.8.06, I had withdrawn the admission order with a direction that the order was not in conformity with law, because, substantial

questions of law were not framed.

2. The parties are heard on the question of admission.

3. The appeal is admitted for hearing the parties on the following substantial question of law:-

> “Whether on the facts and in the circumstances of the case, the learned first appellate court was justified in holding that the allotment conditions relating to raising of construction were directory, were not mandatory and under the circumstances, the plaintiff was entitled to a decree, specially when against the judgment and decree/findings recorded by the trial court, the plaintiff did not file any appeal nor filed any cross-objections under Order XLI Rule 22 of the Code of Civil Procedure?”

4. With the consent of the parties, the matter is finally heard.

5. The respondent-plaintiff had filed the suit for declaration and permanent injunction, submitting

inter alia, that they were allotted part of Survey No. 172 of Keshod admeasuring 4546-1-66 sq.mts. for a period of five years by the District Collector, Junagadh on 30.12.72 and thereafter, permanent allotment was made, according to the plaintiffs, the District Collector had issued a notice to show cause that as construction has not been raised in accordance with the terms of allotment, the State was entitled to forfeit the lease. The plaintiffs submit that they appeared before the Collector, submitted their case, raised various objections including the plea that present was not a case for cancellation of the lease, but was a case for extension of time for raising construction or in the alternative, for imposition of some fine. The Collector decided against the interest of the plaintiffs, therefore, the matter was taken up in revision before the Special Secretary, who, by his order, dismissed the revision, therefore, the plaintiffs filed the present suit out of which, this appeal has come up for hearing.

6. The State Government, in its written statement submitted that the condition was mandatory and the State was entitled to forfeit the lease in case there was any breach of the lease conditions. According to it, appropriate opportunity of hearing was afforded by the Collector and after taking into consideration the pros and cons, the Collector had passed the order, various other pleas were also raised.

7. Learned trial court, after hearing the parties held that the order passed by the Collector and confirmed in revision deserved to be set aside, because, the Collector, before passing the order dated 11.11.87 did not observe the principles of natural justice, did not allow proper opportunity and was unnecessarily influenced by the facts of the case. It also held that as the order passed by the Collector was bad, the order passed in revision would also fall to ground. After holding so, it observed that the Collector would be free to take up the matter and re-decide the same after giving due opportunity of hearing to the plaintiff.

8. The defendant, being aggrieved by the said judgment and decree, filed the appeal. The plaintiffs who were all through contending that the conditions were directory or present was not a case for capital punishment, did not file any cross-appeal, independent appeal or cross-objections in the appeal filed by the State. The learned first appellate court, after hearing the parties held that the trial court was justified in setting aside the orders passed by the Collector and the Special Secretary, but at the same time, declared that the condition for construction was not mandatory. It accordingly dismissed the appeal, but created a situation of an impossibility. On one side, the trial court was saying that the Collector was free to take up the issue afresh, but the learned first appellate court, without even cross-objections had sealed the fate of the State Government.

9. Shri Desai, learned counsel for the appellants submits that the learned first appellate court, if was not satisfied with the argument raised by the State Government, then, it could only

dismiss the appeal, but could not go beyond the findings recorded by the trial court. He also submits that in a given case, plaintiff as respondent would be entitled to convince the appellate court that, if on the findings recorded by the trial court he is not entitled to a decree or judgment in his favour, then, he would be entitled to a decree on other grounds available to the plaintiff, according to him, in a given case, where relief or part of the relief has been refused by the learned trial court, then, in an appeal by the defendant such extra relief cannot be granted by the appellate court in absence of a cross appeal or cross-objections. He submits that the first appellate court could not record a finding that the covenants which are part of the allotment order/lease deed were not mandatory in nature, because, this declaration, though sought by the plaintiff was not given in favour of the plaintiff.

10. Shri Amar D. Mithani, learned counsel for the respondents-plaintiffs, on the other hand,

submits that the issue even before the trial court was that whether the conditions forming part of the lease deed were mandatory or not, according to his submission, if the issue was already there, then, the appellate court was justified in holding that the conditions were directory in nature.

11. The argument of the learned counsel for the respondents-plaintiffs would have been justified in a case where the issue was decided against the interest of the plaintiffs and cross-objections were filed.

12. The effect of the finding that the provisions of the lease deed were directory, would be that even the Collector, even after reopening the matter would not be entitled to reconsider the question. It would be a situation of impossibility, because, on one side, he would be entitled to reopen the matter, but at the same time, he would be bound by the findings recorded by the first appellate court.

13. Present is a case where the plaintiff sought reliefs from the trial court that it be held and

declared that the said terms relating to construction were not mandatory but the trial court did not grant such relief rather required the Collector to reconsider the entire matter. In such case, if the plaintiffs were dissatisfied by non-grant of the relief, then, they were obliged to file an appeal or at least cross-objections under Order IXL Rule 22 of the Code of Civil Procedure. In the considered opinion of this Court, in absence of an appeal or cross-objections, the reliefs which were denied by the trial court could not be granted in favour of the respondents-plaintiffs.

14. In view of the discussion aforesaid, I must hold that in absence of independent appeal or cross-objections at the instance of the plaintiffs, the first appellate court had no jurisdiction to hold that the terms of the lease deed/covenants contained in the allotment order were directory in nature. The said findings recorded by the appellate court deserve to and are accordingly set aside.

15. In view of the answer to the question in favour

of the appellant-State, I must uphold the decree granted by the trial court with liberty in favour of the Collector that he would be entitled to take up the matter afresh and decide the matter in accordance with law after taking into consideration the totality of the circumstances, the intention of the parties and that whether the condition relating to construction was mandatory in view of the nature of the grant. The appeal is allowed to the extent indicated above. No costs. Let decree be framed accordingly.

[R.S. GARG, J.]

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